IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 689 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

FAHTEMABEN ISABHAI SURA

Versus

STATE OF GUJARAT

Appearance:

MR TEJAS KARIA for MR BD KARIA for Petitioner

MR SAMIR DAVE APP for Respondent No. 1

None present for Respondent No. 2

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 03/05/2001

ORAL JUDGEMENT

#. The matter is called out in three rounds but none put appearance for respondent No.2.

#. The brief facts of the case are that the petitioner

filed an application in the court of 5th Judicial Magistrate, First Class, Junagadh under section 125 of the Criminal Procedure Code claiming for maintenance from the respondent No.2 husband. This application came to be allowed by the 5th Judicial Magistrate, First Class, Junagadh under its judgment dated 13.11.1998. The learned Magistrate directed the respondent No.2 to pay the petitioner maintenance @Rs.350/=p.m. from the date of the application. The cost of application has also been awarded in favour of the petitioner. The respondent No.2 being aggrieved by the judgment / order of the Magistrate preferred Criminal Revision Application No.122 of 1998 which came to be decided by learned Additional Sessions Judge, Junagadh under its order dated 3.6.1999. The Criminal Application was allowed and the judgment of the Magistrate was quashed and set aside. Hence this Special Criminal Application under Article 227 of the Constitution of India.

#. Shri Tejas Karia, Learned counsel for the petitioner relying on the decision of this court in the case of Sahinda Abdulla Nathalwala Vs. State of Gujarat & Ors. 2001(1) GLH 500 contended that even after divorce the muslim women is entitled to get maintenance under Section 125 of the Criminal Procedure Code. It is submitted that this right to get maintenance from the husband will not stand nugatory or vanished by enactment of the of Muslim Women (Protection of Rights on Divorce) Act, 1986. It is submitted that the Additional Sessions Judge has manifestly committed error in holding that the divorced muslim wife has no right to get maintenance under Section 125 of the Criminal Procedure Code. Learned counsel for the respondent No.1 has supported the contention made by the learned counsel for the petitioner.

#. Having heard learned counsel for the petitioner, prima facie, I find that what he contended relying on the decision of this court in the case of Sahinda Abdulla Nathalwala Vs. State of Gujarat & Ors. (supra) is correct. The muslim divorced wife's right to get maintenance under Section 125 of the Criminal Procedure may not stand superceded or vanished on enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986. However, this aspect of legal position first needs to be considered by the revisional court.

#. As a result of the aforesaid discussion this Special Criminal Application succeeds and same is allowed and the order dated 3.6.1999 of revisional court is hereby quashed and set aside. The learned Additional Sessions Judge, Junagadh is directed to restore the criminal

revision application to its original number and decide the same on merits keeping in view of the decision of this court in the case of Sahinda Abdulla Nathalwala Vs. State of Gujarat & Ors. (supra) as well as this order. Rule is made absolute accordingly. Though it is a fit case where the petitioner could have been awarded the cost against the respondent No.2 but as she has right to have free legal service as available to her under the Legal Services Authority Act, 1985 and she has not availed of the same it is not fair and reasonable to burden the husband with the costs of this litigation. I fail to see any justification also in the order of the Judicial Magistrate to award costs of the application in favour of the petitioner against the husband. I find that the judicial magistrate has not considered this aspect that the petitioner is entitled for free legal service. The magistrate should have reminded her of this right rather than to unnecessarily burden with the costs of the litigation to the husband. This is not the litigation where the parties are litigating for their property rights or some other rights. It is an unfortunate litigation between the husband and wife. These matters are to be considered on socio-economic aspect rather than to decide on technical approach. To provide free legal services to this class of women this Act is enacted and these persons at the receiving end are not getting the benefit which is clearly borne out from this case. Learned Magistrate has not cared to see that this benefit is received by this lady. Contrary to it he has awarded the cost in favour of the wife against the husband. In the facts of the case, no order as to costs.

(S.K.Keshote, J.)

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